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SCHOOL FUNDING

The issue of public funding of religious institutions in education is bound up with the establishment clause of the First Amendment. The Supreme Court has struggled through a variety of decisions to define what the appropriate level of relationship is between public schools and religion. Today, with voucher programs and Faith-Based Initiatives it is clear that the problem is still unresolved.

HISTORICAL INTRODUCTION

Any discussion of the relationship between public education and religion must begin in 1791 with the Bill of Rights and the antiestablishment clause of the First Amendment. According to the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances:' It is this right of freedom of, and from religion that is the corner- stone upon which the entire debate about public support for religious education is founded. This is often referred to as the *separation of church and state.* The two components require freedom for religious practice on the one hand, but also freedom from the state supporting or *establishing* religion on the other.

In practical terms, the issues of religion and the public school are categorized in two ways in much of the debate: promotion of religious activities in school, and the use of tax dollars to support parochial institutions. A close examination of the record of the Supreme Court on these issues demonstrates congruence with the above categories. This chapter will focus specifically on state funding for parochial schools. With the decision in the Oregon case in 1925 *(Pierce v. society of Sisters)* the right of parents to choose private parochial schools in lieu of public schools was established (www.findlaw.com). From that point on, however, it became an open question as to what degree the state might support activities in these institutions.

MILESTONE DECISIONS BY THE SUPREME COURT

In *Cochran v. Louisiana State Board of Education* (1930), the Court established the *child benefit* doctrine (www.findlaw.com). This doctrine held that private schools could be supported by the state provided it benefited only the child, and not the sectarian mission of the school. The State could then provide money for lunches, textbooks, and health services. This ruling was expanded in *Everson v. Board of Education* in 1947 to include providing buses for transporting parochial students (www.findlaw.com). In this ruling, however, the Court also placed some limitations on the scope of the Everson decision. First, the State could not be *compelled* to provide transportation for parochial schools, but could at its option elect to do so. Second, nonreligious private schools must be included if religious schools were included.

In 1965, the federal government created a major increase in public financing of

education with the enactment of the Elementary and Secondary Education Act of 1965. This law was targeted specifically at low-income schools to provide books, materials, and services. It was significant, however, in that it was not exclusively applicable to public schools, but included private and parochial schools as well.

Perhaps the most important decision regarding religion and the classroom is *Lemon v. Kurtzman* (1971). In this case the Court instituted a three-part test for the constitutionality of any law pertaining to public assistance to religious schools. The Lemon test asked: (1) Does the law have a secular purpose? (2) Is the primary effect of the law to advance religion? (3) Does the law foster excessive government entanglement of religion? The purpose of the Lemon test was to define the meaning of establishment for the Court. It became the dominant measure of the constitutionality of relationships between church and state (www.findlaw.com).

The result of the Lemon test was a clear differentiation of acceptable public support of religious education from unacceptable support. In *Tilton v. Richard- son,* decided the same year as *Lemon,* the Court held that the state could provide money for the building of facilities that had a secular purpose (www.findlaw. com). However, in the *Committee for Public Education and Religious Liberty v. Nyquist* {1973) the Court struck down a law that would have provided money for general facilities upkeep for religious schools on the grounds that there was no way to separate what was religious (unacceptable use) and what was secular (acceptable use) (www.findlaw.com). Likewise, *Nyquist* held that payments to parents of parochial school children in the form of either tuition payments or tax deductions were unconstitutional, as there was no way of limiting the funds to strictly secular purposes. *Nyquist* was struck down because it failed the Lemon test's first and second principles the law did not have a secular purpose, and its effect was the furtherance of religion, even if unintentional.

The majority of the Court's decisions since *Lemon* have adhered to the same standard. Those expenditures that are not for strictly secular purposes or cannot be controlled (for instance, state funding of field trips), are deemed to violate the establishment clause of the First Amendment. However, the principle of *Cochran* (the Child Benefit Doctrine) still holds, and the state can fund things that are secular and benefit the child.

The Court reaffirmed this position in 1985 in *Aguilar v. Felton* (www.findlaw. com). According to *Aguilar,* while Title I funds were designated for both private and public schools, public school teachers could not be assigned to teach students remedial subjects in private schools. *Aguilar* was seen to violate the third Lemon test of excessive entanglement. Schools then proceeded to do such instruction off-campus. However, in 1997, the Supreme Court reversed its decision on *Aguilar* in *Agnostini v. Felton.* The Court now held that public teachers could teach such classes in private schools provided there was "pervasive monitoring" and "administrative cooperation" (www.findlaw.com).

The basis of the Court's reversal in *Agnostini* was found in its ruling on disabled students in parochial schools. In *Zobrest v. Catalina Foothills School District,* the Court found that the district was required under the Individuals with Disabilities Education Act (IDEA) to provide a deaf student attending a Catholic school with an interpreter. The majority held that the presence of the interpreter would not "add to the religious environment" and therefore did not constitute either excessive entanglement or promotion of religion (www.findlaw.com).

Additionally, in *Witters v. Washington Department of Services for the Blind,* the Court held that a tuition grant could be given to an individual who wanted to go to a Christian college without violating the establishment clause. Using the Lemon test, the Court found that because the aid was going to the individual, the state was supporting the

individual, not the institution. Therefore, even if a religious school ultimately benefited, the purpose of the program was secular in intent, did not create an entanglement between church and state, and did not support religion. Thus, the program did not violate the establishment clause. The combination of *Zorbrest* and *Witters'* decisions gave the Court license to allow public school teachers to teach in private schools in *gnostini.*

More recently, the Court has continued in the permissive tradition of *Cochran* and *Lemon* in *Mitchell v. Helms* {2000) (www.findlaw.com). The Court here once again asserted the ability of the states to provide material for religious schools. However in *Helms,* the latitude of the states was significantly expanded to include computers, and other instructional materials. The majority was divided on how broadly its decision was applicable, with Rehnquist, Scalia, 1homas, and Kennedy arguing for a very open policy of government support, while O'Connor and Breyer were more restrained in their concurring opinion (www.findlaw.com).

VOUCHERS

In 2002, the Supreme Court addressed the issue of vouchers with a suit that tested the constitutionality of a voucher program established in Cleveland, Ohio (www.findlaw.com). The Cleveland Scholarship and Tutoring Program (CSTP), ratified by the Ohio Legislature in 1995, is a voucher program that provides parents a voucher that can be used to pay for tuition at private or religious schools. The program is need-based; giving those families whose income is below 200 percent of the poverty level 90 percent of tuition costs or $2,250 whichever is less). Families above 200 percent of the poverty level received 75 percent or $1,875 (whichever is less). These figures have since been raised, and are now linked to the Consumer Price Index. Originally the program included only K-8th grade students in the Cleveland Municipal School District though only students who did not require separate special education), but was expanded in 2003 to 2004 to include 9th grade and above. Since the Court ruled, the program has been made statewide. This established the first large- scale voucher program.

The program allowed parents to use the vouchers to enroll their children in private charter schools. The majority of schools affected by the voucher program were in fact religious schools. The law was challenged on the grounds that it provided monetary support of religious institutions, thus violating the establishment clause of the First Amendment.

The first opinion was from a three-judge panel from the Sixth Circuit Court of Appeals, which had ruled against the Cleveland voucher program. In *Simmon-Harris v.Zelman* the majority ruled "there is no neutral aid when that aid principally flows to religious institutions:' However when the Supreme Court reviewed the ruling it took a quite different approach (www.findlaw.com).

It would seem that the controlling decision for such a case such as *Zelman* would be *Lemon.* However the recent events had made it clear that *Lemon* might ultimately be sidelined. The request of the Bush (Sr.) administration to review the Lemon decision, indicated that conservatives felt the Lemon test was too restrictive. Justice Rehnquist had also noted that Lemon was not as solid as it once had been, and had been questioned at various points by a variety of justices and ignored in some key establishment cases.

Likewise, when it came to the issue of public funding of parochial schools, the history of the Court was much more unpredictable. In *Agnostini v. Felton* the majority consisted of

Justices O'Connor, Rehnquist, Scalia, Thomas, and Kennedy. This five to four decision showed that the Court had changed its thinking on the establishment clause. Justice O'Connor's comments in her opinion are very telling, "What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." In *Agnostini* the answer to that question was clearly it did not create an "impermissible effect" (www.findlaw.com).

The issue of vouchers is much akin to both *Agnostini* and *Witter.* If vouchers are given to the parents and not directly to religious schools, the logic of *Witter* would prevail. By the Court's current understanding of the Lemon test, such aid would not be seen to infringe on the establishment clause. The combination of the conservative block on the Court, coupled with the moderates of O'Connor and Kennedy, could very well have been expected to find vouchers constitutional.

Clearly the major issue, as court history might indicate, is whether this was another attempt at public funding for religious institutions. As the appeals' court quote above indicates, that court concluded it was, and therefore found it un- constitutional. The Supreme Court, however, took a different view. It ruled that the program was secular in its intention; it provided parents of the Cleveland schools an opportunity to choose to send their children to a number of schools; public, private, and religious. That Cleveland has a large number of religious schools, and therefore a large number of parents who availed themselves of the program (82%) sent their children to private religious schools, was ultimately immaterial. As Justice Rehnquist said in his opinion,

> To attribute constitutional significance to the 82% figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed (www.findlaw.com)

In her concurring opinion Sandra Day O'Connor addressed the math of this decision explicitly. Reiterating that there are in fact a number of options aside from private religious schools, Justice O'Connor notes,

> When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. (www.findlaw.com)

Additionally, the fact that only partial scholarships are provided for religious institutions, while magnet and charter schools are provided full funding, is more evidence that the establishment clause has not been violated because money as an incentive was clearly focused on nonreligious options.

Justice Rehnquist wrote the opinion of the court. The basis of the decision for him was not *Lemon,* but was ultimately based on those precedents where the court had focused on individual choice *(Muller v. Allen, Witters v. The Washing- ton Dept. Servicesfor the Blind,* and *Zobrest v. Catalina Foothills School District).* In each of these cases, Rehnquist argues, the right of individual choice trumps the challenge to the establishment clause. As long as individuals make the choice where the money is spent, and there are nonreligious alternatives, there is no violation of the establishment clause to be found.

While Justice Rehnquist did not find *Lemon* relevant in his decision, Justice O'Connor did. In her concurring opinion she argues that the court was, in fact, still upholding *Lemon* as modified by subsequent cases. Instead, Justice O'Connor talks about a "refinement" of *Lemon* by reiterating Justice Rehnquist's theme of "choice."

> What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those ben- eficiaries. (www.findlaw.com)

It is the beneficiaries who choose where the state money may go, and thus it does not create a constitutional violation.

Since the Courts' decision in *Zelman* a number of states have started their own local voucher programs, though most are small pilot programs. Ohio leads the nation once again by establishing the first state-wide voucher program. Nonetheless, the benefits of voucher programs in terms of student achievement are still highly debated. The studies that have been done have found mixed results, and have been hampered by the small sample size of most voucher programs. At this point, the battle over vouchers has shifted to the state courts, where they have been ruled unconstitutional in two states (Florida and Colorado). Other states, however, may soon join the fray, and congress looks to take up a national program sometime soon. There is no doubt that the issue of vouchers will continue to be important in the United States debate on education.

FAITH-BASED INITIATIVES

The other issue that pertains to the issue of public funding of religious institutions is President George W. Bush's program of government support for faith-based charities engaged in social services work. Starting in 2001, President George W. Bush signed a series of Executive Orders that brought into being the Faith-Based and Community Initiatives Office. These orders also established Faith-Based and Community Initiative centers throughout the various departments of the executive branch (Justice, Education, HUD, Labor, etc.). The goal of these orders was to break down barriers restricting the application of government monies to faith-based organizations for com· munity service. Importantly, from the perspective of public education, the requirement of the *No Child Left Behind* legislation that mandated supplemental educational services (such as after-school tutoring, summer intensive programs, etc.) for failing schools, has now become an available venue for faith-based organizations.

The legal history of this program has been mixed, with lower courts deciding for the Bush administration in late 2005, but the Faith-Based Initiative Office was forced to suspend another grant program because of the threat of a lawsuit (Cooperman 2005, A25). No cases have made it as high as the Supreme Court yet.

However, the question of the program's constitutionality remains. It is possible the court will find the program constitutional in the end. The argument for deciding this was laid out by Justice Rehnquist in his dissent in *Edwards v. Aguillard* (www.findlaw.com). There, Rehnquist argued that motivation was not a determinant in deciding establishment. Rehnquist, in fact, makes this argument in regards to social services when he says, "We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage:' Provided that bureaucratic structures are in place that insulate the proselytizing functions from the social functions, it is possible that this pro- gram would pass the Lemon Test.

However, two additional considerations should be noted. First, the Supreme Court has had a history of divining intentions behind a law. In the Louisiana *Balanced Treatment Act* (which allowed teaching creationist alternatives to evolution in the public schools), the legislature had discussed at length in hearings the constitutional issues, and specifically formulated the law in an attempt to avoid those issues. The Court, nevertheless, determined that the true intent was the promotion of a religious belief, not the offering of "all the evidence".While the facts in the case of President Bush's program would certainly be different, if the Court thought that the intent of the program was the advancement of religious institutions, it may well rule that the program violated the establishment clause.

Second, exclusive aid of religious institutions was specifically banned in *Everson.* This decision included both the privileging of one group over another, or the help of religion in general. Much of the controversy regarding Bush's pro- gram is vis-a-vis different religious groups. For instance, will the Nation of Islam be included despite its leader's comments on Jews? Will neo-pagan groups, like the Wiccans who many Christians see as a satanic threat, be eligible? Any at· tempt to distinguish between prima fade religious groups may quickly run afoul of the establishment clause.

With the change in the makeup of the court from the Rehnquist court to the Roberts court, any prediction regarding the constitutionality of Faith-Based Initiatives becomes difficult. However, it is worth noting that the GAO's report on Faith-Based Initiatives in 2006 shows that governmental departments are not making the necessary distinctions that the Court has in the past required (GAO 2006). Appropriate *safeguards* were mandated in the Executive Order 13279 in 2002. However, the GAO's report indicated that such *safeguards* have not been explicitly given to Faith-Based Organizations participating in the program and that much confusion remains. It may be that ultimately it is this that becomes the grounds upon which the program is challenged.

CONCLUSION

The battle over the establishment clause continues on in American public dis- course and jurisprudence. The handful of words provided by the framers of the Bill of Rights has actually produced a host of court cases, as the practical mean- ing of those words is defined and redefined by the Supreme Court. The makeup of the Court continues to be important in what sort of decisions it ultimately reaches. With new members joining the Court it remains to be seen whether the path the Rehnquist Court took will continue.

With the continued criticisms of public schools that have followed the pas- sage of the *No Child Left Behind* law, the turn to private alternatives may in- crease. The decision on vouchers still shows that while the Court has previously been reluctant to give carte blanche to public funding of religious schools, it has opened the door to see them as an alternative, particularly in districts that are considered *failures.* What future decisions will hold, remain to be seen.

See also Homeschooling; Separation of Church and State.

Further Reading: The text of all Appellate and Supreme Court decisions may be found at http://www.findlaw.com; Belfield, Clive R. "The Evidence on Education Vouchers: An Application to the Cleveland Scholarship and Tutoring Program." National Center For The Study of Privatization in Education. January 2006; Black, Amy E., Douglas

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